TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business®

Statement for the Record of Elizabeth Milito, Esq.
NFIB Small Business Legal Center

Before the

U.S. Senate Committee on Small Business and Entrepreneurship

Hearing on: "Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA"

April 27, 2016

National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

Dear Chairman Vitter and Ranking Member Shaheen,

On behalf of the National Federation of Independent Business, I appreciate the opportunity to submit for the record this testimony for the Senate Small Business and Entrepreneurship Committee's hearing entitled, "Drowning in Regulation: The Waters of the U.S. Rule and the Case for Reforming the RFA."

My name is Elizabeth Milito and I serve as the Senior Executive Counsel for the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 325,000 independent business owners who are located throughout the United States.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

Impact of Regulation on Small Business

Overzealous regulation is a perennial concern for small business. The uncertainty caused by future regulation negatively affects a small-business owners' ability to plan for future growth. Since January 2009, "government regulations and red tape" have been listed as among the top-three problems for small business owners, according to the NFIB Research Foundation's monthly Small Business Economic Trends survey.[1] Not surprisingly then, the latest Small Business Economic Trends report analyzing March 2016 data had regulations as the top issue small business owners cite when asked why now is not a good time to expand.[2] Within the small business problem clusters identified by Small Business Problems and Priorities report, "regulations" rank second behind taxes.[3]

Despite the devastating impact of regulation on small business, federal agencies continue to churn out approximately 10 new regulations each day.[4] According to the Administration's fall 2015 regulatory agenda, there are 3,297 federal regulations in the pipeline, waiting for implementation.[5]

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden. Regulatory costs are now nearly $12,000 per employee per year,

[1] NFIB Research Foundation, *Small Business Economic Trends*, at p. 18, March 2016. http://www.nfib.com/research-foundation/surveys/small-business-economic-trends

[2] *Id.*

[3] Wade, Holly, *Small Business Problems and Priorities*, at p. 18, August 2012. https://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf

[4] Data generated from www.regulations.gov

[5] http://www.reginfo.gov/public/do/eAgendaMain

which is 30 percent higher than the regulatory cost burden larger businesses face.[6] This is not surprising, since it's the small business owner, not one of a team of "compliance officers" who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with a federal regulation is one less hour she has to service customers and plan for future growth. Beyond the burden of time and money, excessive regulation creates significant frustration and stress for many small business owners. It is impossible to put a price tag on stress, but it clearly adds to the cost of regulation.

During my twelve years at NFIB I have heard countless stories from small business owners struggling with a new regulatory requirement. To them, the requirement came out of nowhere and they are frustrated that they had "no say" in its development. That is why early engagement in the regulatory process is key for the small business community. But small business owners are not roaming the halls of administrative agencies, reading the *Federal Register, The Hill, Politico,* or *Inside EPA*. Early engagement in the rulemaking process is not easy for the small manufacturer in White Oak, Texas or Bismarck, North Dakota. As a result, small businesses rely heavily on the notice-and-comment rulemaking process, small business protections in the Regulatory Flexibility Act, and internal government checks like the Office of Advocacy at the Small Business Administration and Office of Information Regulatory Affairs to ensure agencies don't impose costly new mandates on small business when viable and less expensive alternatives to achieve regulatory objectives exist.

Small businesses are the forefront of our economy. In fact, small businesses make up 99.7 percent of U.S. employer firms, 63 percent of net new private-sector jobs, and 48.5 percent of private-sector employment.[7] In short, small businesses are employers of choice for nearly half of private-sector employees in this country. This is why NFIB will continue to push for regulations that target a problem and that do not create unnecessary burdensome rules with unintended consequences. Agencies must: (1) consider the unique structure of small businesses; (2) understand why one size fits all laws and rules don't work; and (3) recognize that flexibility – as mandated by the Regulatory Flexibility Act (RFA) - affords small employers the opportunity to treat their employees and their workers fairly and allows small businesses to become community leaders.

Unfortunately, as we come to the end of President Obama's administration, small businesses are scared. They are drowning in a regulatory avalanche, trying to wade through a number of new regulatory requirements with more mandates on the horizon.

---

[6] Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, September 10, 2014. http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf

[7] https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf

While new environmental and financial regulations and regulatory proposals have definitely had a negative impact on small business over the last few years – as evidenced by EPA's Waters of the U.S. rule - today I also want to focus on a category of regulations that doesn't seem to get as much attention from Washington – labor regulations.

Small businesses can be found in virtually all industries. Whether you are a manufacturer, baker, or dry cleaner the one thing you have in common with other business owners is employees. And for the small businesses NFIB represents with, on average, ten or fewer employees, these regulations can be some of the most challenging. The small metal fabricator, for example, goes into business knowing how to finish metal products, he has a good sense of where he can get the supplies he needs, and what kind of skills he's looking for in a workforce. What he likely does not know are the best business practices regarding wage and overtime calculation, compliance with various state and federal discrimination laws, and hiring. Moreover, it is unlikely that the small metal fabricator has a human resources compliance manager to help him navigate those different rules.

Therefore, labor laws definitely represent a significant regulatory "tax" on small business that is likely to be much greater than the "tax" faced by bigger businesses with in-house HR departments. With that as the backdrop, I'd like to discuss several new and proposed regulations out of the Administration have been of particular concern to NFIB and its members.

Environmental Protection Agency Waters of the U.S. Rule

On June 29, 2015, the Environmental Protection Agency (EPA) and the Army Corps of Engineers issued the "Waters of the U.S." rule, which changes the Clean Water Act's definition for "waters of the United States" to govern not just navigable waterways, as stated in the statute, but every place where water could possibly flow or pool. Under the rule, EPA and the Army Corps may now require homebuilders, farmers, and other property owners to spend tens of thousands of dollars on a permit before they can build or even do simple landscaping around seasonal streams, ponds, ditches, and depressions.

The moment this rule goes into effect small businesses will have to seek a federal permit from EPA to improve or develop any land that includes water no matter how incidental. That includes even the smallest project, like digging a post hole or laying mulch, as long as part of that land is wet. Nearly a decade ago, the average cost of a CWA permit was over $270,000. Altering land without a permit can lead to fines of up to $37,500 per day.

Amazingly, EPA and the Army Corps failed to analyze the small business impact of the rule as required by the RFA. In early 2015, SBA's Office of Advocacy formally urged EPA to withdraw the WOTUS rule because of its potentially huge impact on small businesses. It cited the EPA's own estimate that the rule would cost the economy more than $100 million.

NFIB, joined by the U.S. Chamber of Commerce, challenged the rule in a federal court in Oklahoma arguing, among other things, that EPA acted outside of its authority under the Clean Water Act and violated the Regulatory Flexibility Act, and that the rule is an unconstitutional infringement of state rights to regulate intrastate lands and waters.

On October 9, 2015, the 6th Circuit Court of Appeals stopped EPA and the Army Corps from moving forward in implementing the rule until the 6th Circuit can determine whether or not it is legal. While NFIB is pleased with a stay, the drawn out legal proceedings add to the uncertainty caused by future regulation and continue to negatively affect small business' ability to plan for future growth.

Department of Labor "Overtime" Proposed Rule

On July 6, 2015, the Department of Labor published in the *Federal Register* a notice of proposed rulemaking regarding "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees."

The Fair Labor Standards Act (FLSA) generally requires covered employers to pay their employees overtime premium pay of one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek. However, there are a number of exemptions from the FLSA's minimum wage and overtime requirements. Section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), exempts from both minimum wage and overtime protection "any employee employed in a bona fide executive, administrative, or professional capacity…or in the capacity of outside salesman." The FLSA does not define the terms "executive," "administrative," "professional," or "outside salesman."

DOL has consistently used its rulemaking authority to define and clarify the section 13(a)(1) exemptions. Since 1940, the implementing regulations have generally required each of three tests to be met for the exemptions to apply. First, the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"). Second, the amount of salary paid must meet a minimum specified amount (the "salary level test"). Third, the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test").

In its proposed rule, DOL proposes changes only to the salary level test. Currently, the minimum salary that a worker must receive is $455 per week ($23,660 annually). The proposal seeks to more than double that amount to $970 per week ($50,440 annually). In addition, DOL seeks – for the first time – to automatically increase the salary threshold at either the 40th percentile of all salaried wage earners, or at a rate equivalent to the Consumer Price Index for All Urban Consumers (CPI-U). No timeframe for how frequently this increase will take place is proposed, however.

According to DOL's initial regulatory flexibility analysis (IRFA), small businesses will face nearly $750 million in new costs in the first year if the rule is finalized as proposed. These costs are made up of $186.6 million in costs associated with implementing the

rule and $561.5 million in additional wages that will now be paid to workers.[8] Unfortunately, these estimates simultaneously underestimate the compliance costs to small businesses and overestimate the transfers to employees.

First, the IRFA underestimates compliance costs because it does not take into account business size when estimating the time it takes to read, comprehend and implement the proposed changes. As an example, DOL "estimates that each establishment will spend one hour of time for regulatory familiarization." This assumption erroneously disregards a basic reality of regulatory compliance – the smaller the business, the longer and more expensive it is to comply. As previously noted, numerous studies have identified that federal regulatory compliance disproportionately affects small businesses, as compared to larger ones. Primarily, this is because small companies typically lack specialized compliance personnel. Typically, the duty of compliance officer falls to the business owner or the primary manager. These individuals are generally not experts in wading through regulatory text, so familiarization time is greater than for large companies. Alternatively, a small business could hire an outside expert to devise a compliance plan, but this cost will also be significantly greater than what a firm with in-house compliance staff would endure.

In this case, complying with the rule requires far more than simply looking at a salaried employee's weekly wages. This is just one piece of the puzzle. If an employee is currently salaried and makes greater than the current threshold of $455 per week, but less than the proposed $970 per week, the small business owner must now spend a considerable amount of time calculating out varying scenarios – none of which is beneficial for anyone involved.

Department of Labor Proposed Rule on Paid Sick Leave for Federal Contractors

On February 26, 2016 the agency proposed a rule "Establishing Paid Sick Leave for Federal Contractors." If promulgated, small businesses that have contracts with the federal government would be required to provide employees up to seven days of paid sick leave a year, including leave taken to care for a family member. Among other things, NFIB is concerned that this proposed rule would be particularly burdensome on small federal contractors in one of two ways. For covered small businesses that do not have a paid sick leave program, they will have to implement one and figure out how they will pay for it. For covered small businesses that already have a paid leave program, they will have to reconfigure the program to meet the highly prescriptive requirements of the proposed rule.

Department of Labor "Persuader" Rule

On March 24, 2016 DOL finalized a rule, "Interpreting the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA), which will make it difficult and expensive for small business owners to access labor and employment attorneys. The rule is an expansion of the federal "persuader rule," in which businesses must publicly disclose whenever they hire consultants and labor counsel to

[8] *Federal Register*, Vol. 80, No. 128, July6. Page 38606.

assist with anti-union efforts. Under the new rule, attorneys would also need to disclose the names of clients to whom labor information is provided. If either party (attorney or business) does not file or provides false information, **it can mean jail time**.

The rule would affect small businesses the most because they typically don't have in-house lawyers or in-house labor relations experts. Worse, the American Bar Association (ABA) predicts the "persuader rule" will make it much harder for owners to get legal advice. Because the new rule conflicts with attorney-client confidentiality rules, the ABA forecasts that fewer lawyers will practice labor law.

Among other things, NFIB believes DOL is acting outside its authority under the LMRDA, the rule is in violation of the protections afforded all Americans under the First Amendment, and that the agency failed to properly consider small business impact as required under the RFA. As a result, on March 31, we challenged the rule in a federal district court in Texas.

The Case for RFA Reform

Rules such as the ones I've discussed today demonstrate why Congress must take action to level the playing field by reforming the RFA and its amending laws. Currently, agencies are required to perform an IRFA prior to proposing a rule that would have a significant economic impact on a substantial number of small entities – as DOL has confirmed the proposed overtime rule would. While these analyses are helpful for agencies to realize the cost and impact a proposed rule would have on small business, agencies would get additional benefit from convening a Small Business Advocacy Review (SBAR) panel for rules of significant impact.

SBAR panels allow an agency to walk through a potential proposal with small business owners, either in person or via telephone, and receive feedback and other input from those who will be directly impacted by the regulation. These panels are currently required for EPA, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau. NFIB believes all agencies – in particular the entire DOL – would achieve better regulatory outcomes if required to go through such a procedure.

Expansion of the Small Business Regulatory Enforcement and Fairness Act (SBREFA) and SBAR panels to all agencies — including independent agencies – would put agencies in a better position to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts them, and how each agency can develop simple and concise guidance materials. Moreover, Congress and SBA Office of Advocacy should ensure agencies are following the spirit of SBREFA. There are instances where EPA and OSHA have declined to conduct a SBAR panel for a significant rule and/or a rule that would greatly benefit from small business input.

Congress should also demand that agencies perform regulatory flexibility analyses and require agencies to list all of the less-burdensome alternatives that were considered. Each agency should provide an evidence-based explanation for why it chose a more-

burdensome versus less-burdensome option and explain how their rule may act as a barrier to entry for a new business. To this end, the Prove It Act of 2016, would help to overcome poor agency RFA certifications. The bill would require a third-party review when the agency and the SBA Office of Advocacy disagree on small business impact. If the disagreement occurs then the analysis would be turned over to the Office of Information and Regulatory Affairs for review and a determination as to whether the agency must perform a better RFA analysis.

Conclusion

Small businesses are the engine of our economy. Unfortunately, they also bear a disproportionate weight of government regulation. The effects of overregulation require an enormous expense of money and time to remain in compliance. The effort required to follow these and other regulations prevent small business owners from growing and creating new jobs.

Thank you for holding this important hearing shining a light on the fact that regulations are a hidden “tax” on small businesses. I look forward to working with you on this and other issues important to small business.